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NO. 82-

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS C. McCAIN and WILLIAM SPENCER, individually and on behalf of all those similarly situated,

Appellants,

vs.

CHARLES E. LYBRAND, GENE HUIET, HENRY M. HERLONG, ROY A. HARLING, and W. T. TIMMERMAN, individually and as members of the County Council of Edgefield County; NORMAN DORN, JOHN S. EDWARDS, and RICHARD A. BEALS, individually and as members of the Board of Election Commissioners of Edgefield County, S. C.; and J. M. PENDARVIS, individually and as President of the Executive Committee of the Democratic Party of Edgefield County,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the district court erred in ruling that at-large elections adopted in 1966 for the Edgefield, South Carolina County Council had been pre-cleared pursuant to §5 of the Voting Rights Act of 1965, where the Attorney General informed State officials that the 1966 change had never been submitted or pre-cleared?

2. Whether pre-clearance under §5 of a 1971 submission expressly limited to an increase in size of the Council from three to five members, resulted in pre-clearance sub silentio of at-large elections adopted in 1966, where the submission contained no information to enable the Attorney General to determine whether the 1966 use of at-large voting was a change from any prior practice, and in view of the Attorney General's subsequent "please submit" letter?

3. Whether a transfer of powers from State to Edgefield County elected officials pursuant to implementation of statewide home rule is a voting change subject to pre-clearance under §5?

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OPINION BELOW

The opinion of the three-judge court of the United States District Court for the District of South Carolina sought to be reviewed is unreported, and is appended hereto at 1a.

JURISDICTION OF THE COURT

This is an appeal from a decision of a three-judge district court convened pursuant to §5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, and 28 U.S.C. §2284.

The decree sought to be reviewed was entered on May 10, 1982. The notice of appeal was filed in the United States District Court for the District of South Carolina on June 7, 1982. 23a.

Jurisdiction of this appeal is conferred on this Court by 42 U.S.C. §1973c and 28 U.S.C. §1253. Allen v. State Board

of Elections, 393 U.S. 544 (1969).

STATUTORY PROVISION INVOLVED

42 U.S.C. §1973c. 25a.

STATEMENT OF THE CASE

Appellants are black registered voters of Edgefield County, South Carolina, who seek to enforce §5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, and to require pre-clearance of at-large elections for the Edgefield County Council. The Appellees are the five members of the Edgefield County Council, the three members of the Edgefield County Board of Election Commissioners, and the President of the Executive Committee of the Edgefield County Democratic Party.

Factual Background

The original complaint was filed on February 26, 1974 and charged that: (1) at-large elections for the County Council diluted minority voting strength in violation of, inter alia, the Fourteenth and Fifteenth Amendments and §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973; and (2) residential districts for election of Council members were malapportioned on the basis of population.

On May 16, 1974, the district court granted summary judgment for appellants on their one person-one vote claim. The district court was reversed sub nom. Lytle v. Commissioners of Election of Union County, 509 F.2d 1049 (4th Cir. 1974), on the grounds that the districts did not have such a disparity in population as to render them unconstitutional.

On April 17, 1980, after trial on the merits, the district court ruled for appellants on their dilution claim, concluding that "the rights of the blacks to due process and equal protection of the laws in connection with their voting rights have been and continue to be unconstitutionally infringed." McCain v. Lybrand, Civ. No. 74-281 (D.S.C.), p. 20.[1] The district court, however, upon motion of the appellees

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1. Edgefield County has been cited for other constitutional violations, e.g., maintaining racially exclusive jury lists, ibid., p. 13; operating a segregated chain gang, ibid.; maintaining the racially discriminatory character of public schools following desegregation in 1970. Ibid., p. 15.

vacated its opinion following the decision in City of Mobile v. Bolden, 446 U.S. 55 (1980) for the reason that appellants had not proved racial purpose in the adoption or maintenance of the challenged at-large elections. McCain v. Lybrand, supra, August 11, 1980. Those constitutional and §2 issues are still pending in the district court and are not before this Court.

The §5 Issues

Appellants amended their complaint pursuant to order of the district court of November 24, 1980 to raise the §5 issues involved in this appeal.

Prior to November 1, 1964, the government of Edgefield County consisted of two commissioners appointed by the governor upon the recommendation of the members of the General Assembly from the county, and the elected county supervisor

of roads. The commission had only limited powers, basic governance being exercised by the local legislative delegation.

On June 1, 1966, Act No. 1104 was enacted by the state legislature creating the Edgefield County Council. The Act provided for a council of three members elected at-large, by plurality vote, for terms of two years, from specified residential districts. The Act also gave certain powers of home rule to the council.

Although Act No. 1104 of 1966 was a voting qualification or prerequisite to voting, or standard, practice or procedure different from that in force or effect on November 1, 1964, it was never submitted or pre-cleared as required by §5. Stipulations of the Parties, 5.

Act No. 1104 was amended on June 25, 1971 by Act No. 521. The only change made by Act No. 521 was to increase the membership of the council and the number of

residential districts from three to five.[1] Act No. 521 was submitted to the Attorney General pursuant to §5 and no objection to the change involving an increase in the size of the council was interposed.[2]

On June 21, 1976, pursuant to statewide home rule legislation requiring counties to select one of five designated forms of government, S.C. Code §4-9-10 et seq., the Edgefield County Council adopted by ordinance the council-administrator form of government, whereby the council consists of five members elected from residential districts by the voters of the county at-large.

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1. Act No. 521 was entitled: "An Act To Amend Act 1104 Of 1966, As Amended, Relating To A System Of County Government For Edgefield County, So As To Increase The Number Of Districts And The Number Of County Council Members." Stipulations of the Parties. Exhibit C.

2. The clearance letter dated November 24, 1971 provided simply that: "The Attorney General does not interpose any objections to the change in question." 43a.

The 1976 ordinance was eventually submitted for pre-clearance and the Attorney General, on February 8, 1979, objected "to the implementation of the requirements of the South Carolina Home Rule Act in the context of the at-large election system existing in Edgefield County." 37a.[1]

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1. The Attorney General noted that while at-large voting was "ostensibly. . . the same system of election used by the county in electing its present Council, we note differences in that body as presently constituted and as it would exist under the Home Rule Act." 30a. The differences were the powers under home rule to create special taxing districts, to tax different areas at different rates depending on services rendered, to enact ordinances to enforce powers granted by home rule and to fill vacancies on the council by election. Ibid. These changes in the powers of the council "as the organ for the governance of the electorate," formed the basis for §5 review of the county's implementation of home rule. 31a. The Attorney General then concluded that the council had not sustained its burden of proving that at-large elections were not adopted with a discriminatory purpose or that their effect would not be discriminatory.

Despite the objection of the Attorney General, appellees made preparations to hold the 1980 elections for the County Council at-large.[1] Then, on April 17, 1980 and August 11, 1980, the district court entered and vacated respectively its order finding at-large elections in Edgefield County to be unconstitutional.

Four months later, on December 9, 1980, the Assistant Attorney General informed state officials the 1966 Act adopting at-large voting had never been pre-cleared. The State was advised "it is necessary that this Act either be brought before the District Court for the District of Columbia or submitted to the Attorney General." 40a.

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1. After the objection by the Attorney General, the County Council initially voted "to pursue the implementation of single member districts." A Citizens Advisory Committee was formed which recommended a specific plan, but the recommendation was ultimately disregarded. Stipulations of the Parties, 20, 26, Exs. H, I.

The appellants moved to amend their complaint to enforce the Attorney General's §5 objection to implementation of the 1976 home rule ordinance, and to require pre-clearance of the 1966 Act adopting at-large voting.[1] Leave to amend was granted.

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1. The Attorney General's objection to the implementation of home rule had, of course, not been entered at the time the complaint was filed in 1974. In addition, the failure to submit the 1966 act was not disclosed to appellants until the "please submit" letter from the Attorney General on December 9, 1980. For example, in his letter of September 29, 1978 submitting Edgefield's implementation of home rule, the county attorney erroneously represented that the 1966 act had been submitted and pre-cleared by the Department of Justice: "I am enclosing herewith an act of 1966 establishing the Edgefield County Council and amendments thereto in their chronological order, all of which have been approved by the Justice Department." A subsequent records search by the Attorney General disclosed the failure to submit the 1966 Act. Stipulations of the Parties, Exhibit N, 40a.

Appellants moved before the three-judge court for summary judgment on their §5 causes of action. On May 10, 1982, the court denied relief on the grounds that appellees were "not required to submit the 1966 Act to the Attorney General of the United States for pre-clearance, since its provisions, including at-large voting, have been approved by the said Attorney General in pre-clearing the 1971 Act," and the 1976 implementation of home rule "resulted in no change in the form or method of electing Edgefield County Council and are not subject to §5 pre-clearance." 20a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

THE OPINION OF THE THREE-JUDGE COURT THAT THE ADOPTION OF AT-LARGE VOTING FOR THE EDGEFIELD COUNTY COUNCIL IN 1966 HAD BEEN PRE-CLEARED DIRECTLY CONFLICTS WITH §5 OF THE VOTING RIGHTS ACT AND CONTROLLING DECISIONS OF THIS COURT.

A. The 1966 Act Was Never Pre-Cleared.

The district court held that the Attorney General "approved" at-large voting for the Edgefield County Council adopted in 1966 when he pre-cleared an increase in size of the Council in 1971. The conclusion is flatly contradicted by the Attorney General himself who informed state officials on December 9, 1980 that the 1966 Act had never been submitted or pre-cleared.[1] The "mischaracterization" by the district court

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1. This Court has emphasized that deference is due the determinations of the Attorney General under §5. United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110, 131 (1978).

of the Attorney General's actions in pre-clearing the 1971 Act requires reversal. See Blanding v. DuBose, __U.S.___, 102 S.Ct. 715, 719 (1982).

Here, just as in Blanding, the South Carolina district court overrode a §5 determination of the Attorney General. In light of the State's admission that the 1966 act was never submitted to the Department of Justice for pre-clearance, Stip. 5, and the letter from the Attorney General advising that pre-clearance was required, 40a, there is not even a colorable basis for the lower court's decision.

B. The District Court Improperly Usurped the Pre-Clearance Function.

The decision of the district court had the effect of pre-clearing the 1966 Act and amounts to a complete usurpation of the §5 function reserved for the Attorney General and the District Court for the District of Columbia, in violation of the

Voting Rights Act of 1965, 42 U.S.C. §1973c, and relevant decisions of this Court.

This Court has consistently held that the inquiry of a local three-judge court is limited to coverage and does not concern substantive application of §5. Allen v. State Board of Elections, 393 U.S. 544, 570 (1969); Perkins v. Matthews, 400 U.S. 379, 386 (1971); Connor v. Waller, 421 U.S. 657 (1975); Berry v. Doles, 438 U.S. 190 (1978); Dougherty County v. White, 439 U.S. 32 (1978). The district court simply had no jurisdiction to determine that the 1966 Act had met the substantive test of §5--i.e., "its provisions, including at-large voting, have been approved by the said Attorney General." 20a. It is for the Attorney General, or the District Court for the District of Columbia, not the local district court, to determine whether a voting change has in fact met the substantive requirements of §5.

C. The 1966 Act Was Never Properly Submitted.

Under the decisions of this Court and regulations promulgated by the Attorney General implementing §5, it is clear that there never was any legally sufficient submission of the 1966 adoption of at-large voting for the Edgefield County Council.

This Court has held that covered jurisdictions are required "in some unambiguous and recordable manner [to] submit any legislation or regulation in question directly to the Attorney General with a request for his consideration," City of Rome v. United States, 446 U.S. 156, 169 n.6 (1980), quoting from Allen v. State Board of Elections, supra, 393 U.S. at 571, and that the Attorney General be afforded "an adequate opportunity" to determine the purpose or effect of the proposed change. Ibid; United States v. Board of Commissioners of Sheffield,

Alabama, 435 U.S. 110, 136 (1978)("the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him.")[1] Applying the proper test set

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1. In United States v. Board of Commissioners of Sheffield, Alabama, supra, the Attorney General had been informed that if a proposed referendum was pre-cleared and if the proposal to change the form of government was approved in such referendum, that the city would revert to the mayor-aldermanic form that existed in 1912. 435 U.S. at 114 n.5. This Court held that since the submission letter did not request pre-clearance of the change in form of government, but merely volunteered such information, pre-clearance of the holding of the referendum did not clear under §5 the method of electing city officials under the new government. 435 U.S. at 135-38.

out by this Court, Edgefield County's 1971 submission of a change expressly limited to an increase in size of the Council cannot be viewed as an "unambiguous. . .request for. . .consideration" of the 1966 change from appointive to elective government.[1]

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1. The district court attached great importance to the fact that in the process of pre-clearing the 1971 increase in size of the County Council, the Attorney General requested and was provided a copy of the 1966 Act as well as information about elections conducted in 1968 and 1970. 11a. The Attorney General obviously knew that at-large voting was in use in 1966 in Edgefield County, but there was absolutely nothing in the submission or supplemental material to indicate what method of selection was in use prior to 1966. The district court opinion thus allows jurisdictions to play a shell game with §5 by concealing discriminatory practices within ameliorative, unobjectionable voting changes, Beer v. United States, 425 U.S. 130 (1976), a result wholly at variance with the purposes of the Voting Rights Act.

The Attorney General's regulations also require that if a change in voting is not readily apparent on the face of the documents provided, submissions are to contain a "clear statement of the change explaining the difference between the submitted change and the prior law." 28 C.F.R. Part 51, §51.25(b). There can be no contention that any such "clear statement" involving the change in 1966 from appointed to elected government was contained in the 1971 submission or in any of the materials subsequently submitted to the Department of Justice. Indeed, there was no statement or identification of such change at all.

The County's submission in 1971 informed the Attorney General only that it wished to increase the size of the Council from three to five members, but it did not inform the Attorney General in any manner that it had also made a change in 1966 from appointed to elected at-large government

and that pre-clearance of that change was being sought. In order for such a change to be presented to the Department of Justice it would have been necessary to submit the statute and procedures in force and effect prior to 1966.[1] It is absolutely clear from the record and facts in this case that no such information was submitted.[2]

The opinion of the district court is inconsistent with applicable decisions of this Court and Department of Justice regulations governing §5 and should be set aside.

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1. "According to the terms of §5, a covered jurisdiction is in compliance. . .once it has (i) filed a complete submission with the Attorney General, and (ii) received no objection from that office within 60 days." Morris v. Gressette, 432 U.S. 491, 502 (1977).

2. The district court also concluded that the 1971 Act substituted "completely new provisions for the form and method of election of Edgefield County Council." 13a. To the contrary, the 1971 Act made no change whatsoever in the method of at-large

(Footnote continued on next page)

II.

THE DECISION BELOW CONFLICTS WITH A DECISION OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA THAT A TRANSFER OF POWERS UNDER HOME RULE IS A COVERED VOTING CHANGE UNDER §5.

The district court held that the reallocation or transfer of powers from state elected officials to the Edgefield County Council under statewide home rule in 1976 was not a voting change subject to pre-clearance. 20a. The decision directly conflicts with Horry County v. United States, 449 F.Supp. 990, 995 (D.D.C. 1978).

(Footnote continued from preceding page)
voting. The court's finding is in any event wholly inconsistent with its subsequent conclusion that the 1976 implementation of home rule was "no [voting] change" required to be pre-cleared. 20a. Since the 1976 ordinance was a "completely new provision" for local elections, given the court's reasoning it should be subject to pre-clearance without regard to whether it continued the prior use of at-large voting.

The District of Columbia court in Horry County gave two reasons for finding §5 applicable to home rule implementation in Horry County, South Carolina: (1) requiring an appointed governing body to be elected, was a voting change; and (2) the reallocation of governmental powers occasioned by home rule triggered §5 review. Both kinds of changes were found to "affect the voting rights of the citizens of Horry County, and must be subject to Section 5 requirements." 449 F.Supp. at 995.[1]

This Court has consistently held that

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1. The Attorney General, of course, in this case has similarly concluded that the transfer of powers under home rule in Edgefield County furnish an independent basis for objection to the use of at-large voting. 29a. See also Georgia v. United States, 411 U.S. 526, 533-34 (1973)(the fact that a submitting authority treated a practice as required to be submitted is an indication that it is in fact a covered change).

all changes in voting in covered jurisdictions, even those which affect the electorate in only a minor way, are subject to pre-clearance. Perkins v. Matthews, supra; Allen v. State Board of Elections, supra; Dougherty County v. White, supra. The transfer of powers occasioned by implementation of home rule in Edgefield County in 1976 should be deemed covered by §5. Thus, even if the 1966 Act were pre-cleared, the 1976 implementation of at-large voting would still be objectionable under §5.

The Court should note probable jurisdiction to resolve this conflict between the district courts.[1]

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1. The resolution of this issue may prove unnecessary for a decision in this case. If Appellants are correct that the 1966 adoption of at-large voting was never pre-cleared, it necessarily follows that the 1976 home rule implementation of at-large elections was properly subject to §5 review and objection. Berry v. Doles, supra, 438 U.S. at 195 n.1 (concurring opinion of J. Brennan)("the duty to comply with §5 is a continuing one").

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal, and grant summary judgment for Appellants or set the case for oral argument.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

Thomas C. McCain, Ernest Williams and William Spencer, Individually and on behalf of all those similarly situated, Plaintiffs, vs Charles E. Lybrand, Gene Huiet, Henry M. Herlong, Roy A. Harling, and W.T. Timmerman, Individually and as members of the County Council of Edgefield County; Norman Dorn, John S. Edwards and Richard A. Beals, Individually and as members of the Board of Election Commissioners of Edgefield County, South Carolina; and J.M. Pendarvis, Individually and as President of the Executive Committee of the Democratic Party of Edgefield County, Defendants.	FILED MAY 10, 1982 Civil Action No. 74-281 O R D E R

This three-judge district court was empaneled to hear plaintiffs' claims that changes in statutes and ordinances governing election of the Edgefield County Council have been put into effect in violation of § 5 of the Voting Rights Act of 1965, '2 U.S.C. § 1973c. Plaintiffs are black voters of Edgefield County, South Carolina. The defendants are the five members of the Edgefield County Council, the three members of the Edgefield County Board of Election Commissioners and the president of the executive committee of the Edgefield County Democratic Party.

The initial complaint filed on February 26, 1974 contended (1) that the method of electing the Edgefield County Council diluted black voting strength in violation of the First, Thirteenth, Fourteenth and Fifteenth Amendments and 42 U.S.C. §§ 1971, 1972 and 1973, and (2) that council residency districts were malappor-

tioned on the basis of population.

The initial complaint sought relief in the form of a declaratory judgment that the Edgefield County plan violated the plaintiffs' constitutional rights, an injunction prohibiting the defendants from holding further elections under the plan, and an order requiring Edgefield County Council to reapportion itself in a constitutional manner. On May 16, 1974 the Honorable Sol Blatt, Jr. granted a motion for summary judgment by the plaintiffs, holding that because of the unequal apportionment of certain of the districts within the county, the one-man, one-vote principle had been violated. On appeal this matter was heard and decided with Lytle v. Commissioners of Election of Union County, 509 F.2d 1049 (4th Cir. 1974). The circuit court found that the Edgefield County plan did not have such a variance or disparity in population among districts as to require

the deletion on constitutional grounds of the residency requirements imposed by the statute. On June 19, 1975, the district court granted the defendants' motion for summary judgment on the one-man, one-vote claim.

The remaining issue, whether the method and apportionment of election of Edgefield County Council dilutes the voting strength of black citizens of Edgefield County in violation of their constitutional rights, was tried on November 24 and 25, 1975. A ruling on this issue was delayed for several years at the request of all attorneys, while they attempted to settle the case and agree on enabling legislation. These efforts did not come to fruition. On April 17, 1980 the district court entered an order finding that the at-large method of electing the Edgefield County Council infringed upon "the rights of the blacks to due process and equal protection in

connection with their voting rights."

Four days later defendants moved the district court to vacate its April 17 order on grounds that the court had not expressly found intent to discriminate as required by the Supreme Court's then recent decision in City of Mobile v. Bolden, 446 U.S. 55 (1980). This motion was granted on August 11, 1980. The court also reopened the evidentiary portion of the case to allow the parties to submit any additional evidence on the issue of intent to discriminate. By second supplemental complaint (filed pursuant to order dated November 24, 1980), plaintiffs added their claims for relief under § 5 of the Voting Rights Act of 1965.

Prior to November 1, 1964 Edgefield County was governed by a board of county commissioners, consisting of an elected county supervisor and two commissioners appointed by the Governor upon the recom-

mendation of the Edgefield County legislative delegation. On June 1, 1966 the South Carolina General Assembly passed Act No. 1104 creating the Edgefield County Council. The council consisted of three members, one from each of three designated residency districts. Voting on each member was not by district, but by county at-large.

Edgefield County is subject to the provisions of the Voting Rights Act of 1965. There is no dispute that Act No. 1104 of 1966 was subject to the preclearance provisions of § 5 of the Act and that county officials should have, but did not, submit the Act to the Justice Department or to the District Court for the District of Columbia for preclearance.

Act No. 1104 of 1966 was amended on June 25, 1971 by Act No. 521. Act No. 521 increased both the number of residency districts in Edgefield County and the number of Edgefield County Council members

from three to five. On September 24, 1971, Act No. 521 of 1971 was submitted to the Justice Department for preclearance. The Attorney General did not object to the provisions of the Act.

In 1975 the South Carolina General Assembly passed Act No. 283, the Home Rule Act, which is now codified at S. C. Code §§ 4-9-10, et seq (1976). The Act permitted each county to hold a referendum to choose one of five alternative forms of county government. If a county did not conduct such a referendum by July 1, 1976, the Act provided that the county would as of that date, "have the form of government including the method of election, number, composition and terms of the governing body most nearly corresponding to the form in effect immediately prior to that date." In the case of Edgefield County, the General Assembly determined the closest of the five stipulated forms to be the council-

administrator form of government. The Home Rule Act was precleared by the Attorney General by letter dated June 27, 1975.

No referendum was held in Edgefield County. On June 21, 1976 the Edgefield County Council adopted by resolution and ordinance the council-administrator form of government. On September 28, 1978 the resolution and ordinance passed on June 21 were submitted to the Justice Department for preclearance. After asking for additional information, the Attorney General interposed an objection to the resolution and ordinance on February 8, 1979.

Shortly thereafter, the Edgefield County Council met to consider the Attorney General's objection to the resolution and ordinance. A committee was appointed to study implementation of single-member districts. In May of 1979 the committee issued a report proposing adoption of single-member election districts for the

Edgefield County Council. One year later the district court entered its April 17 order striking down the method of election in Edgefield County. On April 21, 1980, the Edgefield County Council met and passed a resolution directing the county attorney to meet with the district court regarding implementation of a single-member district election plan. Four days later defendants moved the district court to vacate its April 17 order on grounds of the Supreme Court's decision in City of Mobile v. Bolden, supra.

In their second supplemental complaint, plaintiffs contend that defendants should be enjoined from use of at-large voting because 1966 Act No. 1104 has never been precleared. It is plaintiffs' position that this court should view the failure of the Attorney General to interpose objection to 1971 Act as merely relating to the change in the number of

council members and district from three to five. Plaintiffs' arguments would require this court to find that the Attorney General did not consider the effect of at-large, as opposed to district, voting when he elected not to object to 1971 Act No. 521. Analysis of both the facts before the Attorney General and his requests for additional information do not bear out plaintiffs' argument.

Although 1971 Act No. 521 is entitled, "An Act To Amend Act 1104 of 1966. . . So As To Increase The Number of Districts And The Number of County Council Members," every indication is that the Attorney General did not limit his consideration of the Act to the change in number of districts and number of council members. In the late summer of 1971, David L. Norman of the Justice Department contacted state officials and requested additional information in connection with

the evaluation of Act No. 521. Norman asked that the State provide "maps showing the boundaries of the County Council districts under the existing statute as well as under [Act No. 521]." He also requested "population and registration statistics, by race, for the present election districts and the proposed election districts as well as a copy of the election statute now in force." (emphasis added). Mr. Norman additionally stated, "It will also be necessary for us to know the names, and race, of all candidates for County Council in the last two primary and general elections, and the results of these elections by district." All of the requested information was submitted to the Justice Department except the population of the election districts by race, which information was not available.

The information requested and received by Norman indicates that he had the 1966 Act before him and was aware that the form and method of election of the Edgefield County Council then in effect had been adopted in 1966. Norman's letter requesting information about the former districts and results of elections by race indicates that Justice Department's review of Act No. 521 encompassed all aspects of the Act, including the effect of the at-large with residency requirement voting that had been implemented in 1966. Since the Attorney General approved the at-large with residence district form of election in 1971, any defect in the 1966 Act No. 1104 is moot. It would serve no useful purpose at this late date to set aside the 1966 Act. The Attorney General in 1971 approved all pertinent provisions of the 1966 Act when he examined and approved

the 1971 amendment.

Analysis of the language of the two acts - 1966 Act No. 1104 and 1971 Act No. 521 - compels rejection of plaintiffs' contention that failure to submit Act No. 1104 dooms the present method of electing the Edgefield County Council. Although Act No. 521 changed only the number of residency districts and members of the council, the Act provides for the"striking out" of all provisions of the 1966 Act dealing with the form and method of electing county council. The Act then substitutes completely new provisions for the form and method of election of Edgefield County Council, including provisions for the at-large with residency requirement form of election. The Attorney General's approval of these new provisions also renders moot any objection to the superceded 1966 provisions.

Plaintiffs' second argument is that at-large voting for Edgefield County Council should be enjoined since the Attorney General objected to implementation of the June 21, 1976, council resolution and ordinance adopting the council-administrator form of government for Edgefield County. Defendants contend that implementation of the Home Rule Act is not a "change" subject to §5 preclearance. Plaintiffs assert that defendants do not have standing to question the Attorney General's decision to object to the resolution and ordinance.

Turning first to the standing issue, plaintiffs' reliance on Morris v. Gressette, 432 U.S. 491 (1977), is misplaced. Section 5 affords jurisdictions covered by the Voting Rights Act the alternative of obtaining the Attorney General's approval of changes in the form or method of elections in covered

jurisdictions. This alternative avoids the necessity of initiating an action (to obtain approval of a change in voting laws) in the District Court for the District of Columbia. In Morris v. Gressette, supra, the Supreme Court reasoned that permitting district court review of the Attorney General's decision not to object to a proposed change would deny covered jurisdictions the expeditious alternative of seeking preclearance from the Attorney General. The court ruled that protection of this less burdensome method of review justified prohibiting review of the Attorney General's decision not to object. Id. at 504-505.

In the instant case, defendants question the Attorney General's decision to object to June 21, 1976 resolution and ordinance implementing the Home Rule Act in Edgefield County. Review of the

Attorney General's decision under these circumstances does not implicate the County's interest in the less burdensome method of preclearance, and Morris v. Gressette, supra, therefore, is inapplicable. Whether the alleged changes in the form and method of electing the Edgefield County Council are subject to §5 of the Voting Rights Act is squarely within this court's scope of review. Georgia v. United States, 411 U.S. 526, 527-35 (1973), and Woods v. Hamilton, 473 F. Supp. 641 (D.S.C. 1979). Accordingly, we address defendants' contentions that Edgefield County's implementation of the Home Rule Act was not a "change" in voting laws subject to §5 of the Voting Rights Act.

Plaintiffs argue that implementation of the Home Rule Act in Edgefield County was a change in election procedure subject to §5 of the Act. This issue was

addressed in Woods v. Hamilton, supra at 644-47, where the court held that the ministerial act of passing ordinances implementing the Home Rule Act (which Act had previously been precleared) in Charleston County, were not "changes" covered by §5 of the Voting Rights Act. Id., at 647. In reaching that decision, the court expressly rejected the analysis undertaken in Horry County v. United States, 449 F. Supp. 990 (D.D.C.1978), upon which plaintiffs now rely. We hold that the Attorney General's June 27, 1975 letter to state officials precleared both the holding of referenda and the transfer of powers under the Home Rule Act. We also hold that the June 21, 1976 resolution and ordinance resulted in no change in the form or method of electing Edgefield County Council, and that the June 21 resolution and ordinance are not a change subject to §5 preclearance. Woods

v. Hamilton, supra, at 644-45.

Plaintiffs' final argument is that at-large elections for Edgefield County Council should be enjoined since county officials sought to implement a single-member district apportionment for the Edgefield County Council. This contention is without merit since defendants never adopted a single-member district plan.

Immediately following the district court's April 17, 1980 order striking down the at-large method of election, county council took the following action:

> A motion was made by Councilman Herlong and seconded by Councilman Williams to have the county attorney schedule a meeting with Judge Chapman and discuss with him the plan of action that has been recommended to the Edgefield County Council by the Citizens' Advisory Committee to establish single member districts and request the judge to allow us to put the plan into effect for the 1982 election, utilizing

> the 1980 census data in order that we will not have to redistrict twice. Also to hold a special election for the council members will be expensive. Motion carried.

While it is clear that the Edgefield County Council discussed and studied single-member district elections, the council never formally adopted such a method of election. The details of a plan were never agreed upon or adopted and the tentative actions undertaken here do not require preclearance by the Attorney General. This action could not be submitted to or approved by the Attorney General because it did not actually establish single member districts or define the boundaries of such districts.

The supplemental complaint asks this court to declare the rights of the parties and enjoin the holding of elections for Edgefield County Council at-large. To reiterate, we hold:

1. That defendants are not required to submit the 1966 Act to the Attorney General of the United States for preclearance, since its provisions, including at-large voting, have been approved by the said Attorney General in preclearing the 1971 Act.

2. That the Attorney General's letter of June 27, 1975 to South Carolina officials approved for the purpose of the Voting Rights Act the holding of referenda and the transfer of powers under the Home Rule Act, and this included Edgefield County Council.

3. The June 21, 1976 Edgefield County Council resolution and ordinance adopting the council-administrator form of government for Edgefield County resulted in no change in the form or method of electing Edgefield County Council and are not subject to §5 preclearance.

4. The motion adopted by Edgefield County Council on April 21, 1980 was never implemented and did not result in a change in the method of election and is not subject to approval or preclearance for this reason.

5. That the actions of defendants in preparing to hold elections for County Council at-large are not in violation of §5 of the Voting Rights Act.

6. That the plaintiffs' request for an injunction to prevent the holding of elections for Edgefield County Council under the present at-large system is denied.

AND IT IS SO ORDERED.

s/Clement F. Haynsworth, Jr.
Clement F. Haynsworth, Jr.
United States Circuit Judge

s/Donald S. Russell
Donald S. Russell
United States Circuit Judge

s/Robert F. Chapman
Robert F. Chapman
United States Circuit Judge

May 10, 1982.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

THOMAS C. McCAIN, ET AL., Plaintiffs, v. CHARLES E. LYBRAND, ET AL., Defendants.	FILED June 7, 1982 CIVIL ACTION NO. 74-281

Notice of Appeal

Plaintiffs Thomas C. McCain and William Spencer, hereby appeal to the Supreme Court of the United States from the order of the District Court denying declaratory and injunctive relief entered in this case on May 10, 1982. This appeal is taken pursuant to 28 U.S.C. §1253 and 42 U.S.C. §1973c.

s/Laughlin McDonald
LAUGHLIN McDONALD
NEIL BRADLEY
CHRISTOPHER COATES
Suite 355

52 Fairlie Street, N.W.
Atlanta, Georgia 30303-2188

s/Armand Derfner
ARMAND DERFNER
1301 Pennsylvania Avenue,
N.W.
Washington, D.C. 20005

s/Herbert E. Buhl, III
HERBERT E. BUHL, III
533 Harden Street
Columbia, South Carolina
29205

42 U.S.C. §1973c:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1968, or

whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section (4)(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite,

procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate officials of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates

that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional informations comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

FEB 8 1979

Mr. H.O. Carter
County Administrator
Edgefield County Council
Post Office Box 663
Edgefield, South Carolina 29824

Dear Mr. Carter:

This is in reference to the implementation of the South Carolina Home Rule Act by Edgefield County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was completed on December 10, 1978.

We have given careful consideration to information furnished by you as well as Bureau of the Census data and information and comments from interested parties. Our analysis reveals that blacks constitute 52 percent of the population of Edgefield County and that under the proposed ordinance implementing Home Rule, council members will be elected at large from residency districts. While this is,

ostensibly, the same system of election used by the county in electing its present council, we note differences in that body as presently constituted and as it would exist under the Home Rule Act.

According to our information, under "Home Rule", the county council may create special taxing districts, tax different areas at different rates depending on services rendered, enact ordinances to enforce powers granted by the Home Rule Act and fill vacancies on the council by election rather than appointment by the Governor upon the recommendation of the membership of the House of Representatives from Edgefield County. According to our information these powers, and others, were not previously exercised by the county council. Thus, as we perceive it, even though the formal structure of the council remains the same, the changes resulting from compliance with the Home Rule Act

alter the council as the organ for the governance of the electorate and, accordingly, form the basis for evaluating the system under which the more responsible form of government ordained by the Home Rule Act is to be elected. That form of government requires at-large elections with residency districts.

Court decisions, to which we feel obligated to give great weight, have established that the use of at-large elections in situations where there is a cognizable racial minority and a history of voting along racial lines has the potential for impermissibly diluting minority voting strength. See White v. Regester, 412 U.S. 755 (1973); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 836 (1976); Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978), prob. jur. noted, 47 U.S.L.W. 3221 (U.S. Oct. 2, 1978)(No. 77-1844). Our analysis of your

submission reveals that although blacks represent a substantial proportion of the population of Edgefield County, no blacks have ever been elected to the Edgefield County Council. Our analysis further reveals that bloc voting along racial lines exists in Edgefield County. With racial bloc voting present and under the at-large elections blacks have not elected candidates of their choice to the county council. Under a system of fairly drawn single member districts, blacks would be afforded access to the political process in Edgefield County.

Furthermore, a significant element of our analysis during the review of a change such as this is in the nature of home rule itself. As originally conceived and presented to the public, "home rule" was a new system that transferred a significant measure of political power from each county's legislative delegation to the

county councils in a way that called for the full and active participation of the electorate in selecting the type of government and the method of election through referenda called by the county council, the legislature (at the suggestion of the county's legislative delegation) or upon the petition of 10% of the registered electorate. It was on such understanding of public participation and involvement that the Attorney General declined to object to the statewide home rule authorization act when it was submitted in 1975. Moreover, we understood that the electorate in each county would choose among the systems set forth in the Home Rule Act - i.e., single-member districts or at-large elections and one of the designated alternate forms of government.

Home rule, as we understood it from contemporaneous representations, was to be essentially a new and expanded

system of county governance which would provide a readily available opportunity for expression of the preferences of the electorate from among the specifically enumerated types of government and methods of election. However, as interpreted to date by the South Carolina judiciary, "home rule" appears to be something less than what initially was represented to us. First, in Dodds v. Stuckey, the court determined that instead of being limited to the specified methods of election enumerated in the Act, the method of election then existing in Charleston County (at-large with residency districts) would, in the absence of a referendum, be continued. Second, in Infinger v. Edwards the court held (again with respect to Charleston County) that a referendum could not be held after July 1976 despite the filing of a timely and sufficient petition prior to that date. Finally, in Hamilton v. Tillman the court held that no subsequent referendum on method of election could be held since the law allowed

referenda only with respect to form of government, not method of election.

While we are mindful of the fact that the question of the sufficiency of the petition filed in Edgefield's case is still pending before the state court, the only existing judicial interpretations we have available to us at the present time are those noted above. Had these interpretations of the Home Rule Act been available to use at the time of our initial consideration they would have had a significant impact on our evaluation of the statewide consequences of home rule. Even though we recognize that that appraisal is now beyond recall, the state court's interpretations are now available and must be taken into consideration in our analysis of the effects of "home rule" in Edgefield County.

Our review discloses that there has been substantial support for a referendum in Edgefield County, particularly

among the black voters. According to our information black citizens of Edgefield County filed petition in May 1976 requesting such a referendum, a request that was denied by the county and which is now pending before the State Supreme Court. It is our further information that black citizens in Edgefield strongly favor the adoption of a single member district system of elections. However, because the county has rejected the effort of the black community to petition for a referendum and since the county also has chosen not to call for such a referendum on its own motion, the apparent sentiment for a change to single-member districts has not been brought to a vote. Accordingly, the promise of public participation in the selection of the form of government and method of election under home rule has simply not been realized in Edgefield County.

Under Section 5 the submitting jurisdiction has the burden of proving both that the change in question was not adopted with a discriminatory purpose and that its effect will not be discriminatory. Georgia v. United States, 411 U.S. 526, 538 (1973), City of Richmond v. United States, 422 U.S. 358, 380-81 (1975)(Brennan, J., dissenting), 28 C.F.R. 51.19.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that that burden has been sustained in this instance. Accordingly, on behalf of the Attorney General, I must interpose an objection to the implementation of the requirements of the South Carolina Home Rule Act in the context of the at-large election system existing in Edgefield County. However, should the county undertake to adopt an electoral system that more accurately reflects minority voting

strength such as single-member distructs, the Attorney General will reconsider his determination upon being so advised.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes in question do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. In addition, the Procedures for the Administration of Section 5 (28 C.F.R. 51.21(b) and (c), 51.23, and 51.24) permit you to request reconsideration of this objection by the Attorney General. However, until the judgment from the District Court is obtained or the objection withdrawn, the effect of the objection by the Attorney General is to make the changes required by the Home Rule Act legally unenforceable.

To enable this Department to meet

its responsibility to enforce the Voting Rights Act, please inform us within twenty days of your receipt of this letter of the course of action the County plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Voting Section Attorney David R. Hunter at 202/633-3849.

Sincerely,

Drew S. Days III
Assistant Attorney General
Civil Rights Division

U.S. Department of Justice

DEC 12 1980

DSD: GWJ: DHH: ca
JJ 166-012-3
D5564

Washington, D.C. 20530

Ms. Treva Ashworth
Senior Assistant Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Ms. Ashworth:

This is in reference to the status under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, of the governing body of Edgefield County, South Carolina.

Act 1104 of 1966 (R1357, H2559) established the governing body of Edgefield County, defined the powers of that body, and established the method of its election. A thorough investigation of our files and records has led us to conclude that this act was never submitted either to the United States District Court for the

District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5.

If our information is correct, it is necessary that this Act either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that it has neither the purpose nor the effect of denying or abridging the vote on account of race or color.

Should you elect to submit this Act to the Attorney General, please follow the procedures set forth in the Procedures for the Administration of Section 5 (28 C.F.R. Part 51).

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us within ten days of your receipt of this letter what action the State of South Carolina plans to take with respect to this matter. If you have any question concerning this

letter, please feel free to call Voting Section Attorney David H. Hunter, 202 724-7189. Please refer to File No. D5564 in any written response to this letter so that your correspondence will be properly channeled.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

By:

GERALD W. JONES
Chief, Voting Section

cc: Karen LeCraft Henderson, Esq.
Charles W. Coleman, Esq.
Laughlin McDonald, Esq.
Armand Derfner, Esq.

Department of Justice
Washington

Nov 24, 1971

Mr. James H. Quackenbush, Jr.
Assistant Attorney General
State of South Carolina
Post Office Box 11549
Columbis, South Carolina 29211

Dear Mr. Quackenbush:

This is in reference to your letter of September 24, 1971, concerning the submission of H2206 to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended.

The Attorney General does not interpose any objections to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

Sincerely,

s/David L. Norman

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division